Supreme Court, U.S.
FILED
APR 01 2003
CLERK

No. 02-1221

In the Supreme Court of the United States

UNITED STATES SHOE CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
PAUL G. FREEBORNE
TODD M. HUGHES
JONATHAN S. LAWLOR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25 pp

QUESTIONS PRESENTED

1. Whether 19 U.S.C. 1505 or 28 U.S.C. 2411 authorizes an award of pre-judgment interest on a judgment for the return of fees collected by the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461.

2. Whether the Export Clause or the Takings Clause of the Constitution authorizes an award of pre-judgment interest on a judgment for the return of fees collected by the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

BMW Manufacturing Corp. v. *United States*, 241 F.3d 1357 (Fed. Cir.), cert. denied, 534 U.S. 1065 (2001)	10
Boeing Corp. v. *United States*, No. 01-1209 (Mar. 4, 2003)	11
Boston Sand & Gravel Co. v. *United States*, 278 U.S. 41 (1928)	12
Cyprus Amax Coal Co. v. *United States*, 205 F.3d 1369 (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001)	13
Fairbank v. *United States*, 181 U.S. 283 (1901)	12, 13
First English Evangelical Lutheran Church v. *Los Angeles County*, 482 U.S. 304 (1987)	12
Henkels v. *Sutherland*, 271 U.S. 298 (1926)	16, 17, 18
Ikelionwu v. *United States*, 150 F.3d 233 (2d Cir. 1998)	18
International Business Machines v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), cert. denied, 531 U.S. 1183 (2001)	4, 5, 8, 9, 10
Larson v. *United States*, 274 U.S. 310 (1st Cir. 1986)	18, 19
Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	*passim*
Seaboard Air Line Ry. v. *United States*, 261 U.S. 299 (1923)	12
Smyth v. *United States*, 302 U.S. 329 (1937)	11
Texport Oil Co. v. *United States*, 185 F.3d 1291 (Fed. Cir. 1999)	10

Cases—Continued: Page

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951) 12, 13
United States v. *$515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998) 18
United States v. *Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976) 15
United States v. *Louisiana*, 446 U.S. 253 (1980) 16
United States v. *$133,735.30 Seized*, 139 F.3d 729 (9th Cir. 1998) 18
United States v. *$7,990.00 in U.S. Currency*, 170 F.3d 843 (8th Cir.), cert. dismissed, 528 U.S. 1041 (1999) 18
United States v. *Sperry Corp.*, 493 U.S. 52 (1989) 6, 14
United States v. *$30,006.25 in U.S. Currency*, 236 F.3d 610 (10th Cir. 2000) 18
United States v. *$277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995) 18, 19
United States v. *United States Shoe Corp.*, 523 U.S. 360 (1998) 2, 3, 6, 10, 14
United States ex rel. Angarica v. *Bayard*, 127 U.S. 251 (1888) 15

Constitution and statutes:

U.S. Const.:
Art. I, § 9, Cl. 5 (Export Clause) 2, 3, 6, 11, 12, 13, 14
Amend. V 5, 6, 12
Due Process Clause 6
Takings Clause 6, 11, 14
Harbor Maintenance Tax, Pub. L. No. 99-662, § 1401, 100 Stat. 4266 ..... 2, 3, 4, 5, 6, 8, 9, 10
§ 1402:
26 U.S.C. 4461 2
26 U.S.C. 4461(a) 2
26 U.S.C. 4461(b) 2, 3
26 U.S.C. 4461(c)(1) 10
26 U.S.C. 4462(f)(1) 4, 8

Statutes—Continued:	Page
26 U.S.C. 4462(f)(3)	8, 9
§ 1403:	
26 U.S.C. 9505	14
26 U.S.C. 9505(a)	2
26 U.S.C. 9505(c)	2
Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082	2
19 U.S.C. 197	10
19 U.S.C. 1484	10
19 U.S.C. 1503	10
19 U.S.C. 1505	4
19 U.S.C. 1505(c)	5, 9
28 U.S.C. 1581(a)	5
28 U.S.C. 1581(i)	5
28 U.S.C. 2411	4, 8, 9
28 U.S.C. 2465(b)(1)(C)	19
28 U.S.C. 2644	4, 5
31 U.S. 9107	10
Miscellaneous:	
64 Fed. Reg. 56,436 (1999)	11
66 Fed. Reg. 34,818 (2001)	10
S. Rep. No. 126, 99th Cong., 1st Sess. (1985)	2

In the Supreme Court of the United States

No. 02-1221

UNITED STATES SHOE CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 296 F.3d 1378. The opinion of the Court of International Trade (Pet. App. 13a-19a) is reported at 20 C.I.T. 206.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2002. The petition for rehearing was denied on October 22, 2002. Pet. App. 114a-115a. On January 8, 2003, the Chief Justice extended the time within which to file the petition for a writ of certiorari to and including February 19, 2003, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

Petitioner is an exporter of goods. Pursuant to this Court's decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), petitioner received a refund of payments it made to the United States under the Harbor Maintenance Tax, 26 U.S.C. 4461. Petitioner now also claims an entitlement to pre-judgment interest on the amount of that refund. That claim for interest, which was denied by the court of appeals, is the subject of this petition.

1. In 1986, Congress enacted the Harbor Maintenance Tax as part of the Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082. The Harbor Maintenance Tax imposes a fee "on any port use" by commercial importers, exporters, domestic shippers, and passenger liners. 26 U.S.C. 4461(a). For shipments of goods, this port use fee is set at "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). The purpose of this fee is to require the entities that benefit from the use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The funds collected by the United States through this port use fee are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a), (c).

2. In 1998, this Court held that the Harbor Maintenance Tax, as applied to shipments of exported goods, violates the prohibition contained in the Export Clause of the United States Constitution that "[n]o Tax or

Duty shall be laid on Articles exported from any State." *United States* v. *United States Shoe Corp.*, 523 U.S. 360. In reaching that conclusion, the Court did not disagree with the government's contention that an appropriate port use fee could be applied to exports under the Court's Export Clause jurisprudence. *Id.* at 367. The Court emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance." *Id.* at 370. The Court held, however, "that such a fee must fairly match the exporters' use of port services and facilities" and concluded that the Harbor Maintenance Tax does not qualify as "a bona fide user fee in the Export Clause context" because "the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here." *Id.* at 369-370. The Court held that the port use fee could not be applied to exports because the value of the exported cargo on which the Harbor Maintenance Tax is calculated (26 U.S.C. 4461(b)) "does not correlate reliably with the federal harbor services used or usable by the exporter." 523 U.S. at 369. The Court indicated, by contrast, that a harbor maintenance charge applying to exports could be sustained if it were instead based "on factors such as the size and tonnage of a vessel, the length of time it spends in ports, and the services it requires." *Ibid.*

3. Following the decision of this Court in *United States Shoe Corp.*, the Court of International Trade entered judgment for petitioner for the amount of its Harbor Maintenance Tax payments and for "interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411." Pet. App. 112a. The statute on which the court relied authorizes interest "at the over-payment rate established under section 6621 of the

Internal Revenue Code" on a judgment entered by any court "for any overpayment in respect of any internal-revenue tax." 28 U.S.C. 2411.

4. The United States appealed the award of interest. Relying in large part on its prior decision in *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (2000) (*IBM*), cert. denied, 531 U.S. 1183 (2001), the court of appeals reversed. Pet. App. 1a-19a.

a. The court first rejected petitioner's assertion that interest is authorized in this case under statutory provisions pertaining to refunds of internal revenue taxes (28 U.S.C. 2411) and customs exactions (28 U.S.C 2644 and 19 U.S.C. 1505). Pet. App. 5a-6a. The court noted that, in *IBM*, the court had already considered and rejected the same arguments advanced by petitioner in this case. Pet. App. 5a-6a.

As in *IBM*, the court explained that 28 U.S.C. 2411 does not authorize an award of interest in this case because that statute provides for interest only on an "overpayment in respect of any internal-revenue tax" (28 U.S.C. 2411). This statute does not apply to the Harbor Maintenance Tax because Congress specified that "all *administrative and enforcement provisions of customs laws* and regulations shall apply [to the Harbor Maintenance Tax] as if such tax were a customs duty" (26 U.S.C. 4462(f)(1) (emphasis added)). Interest cannot be awarded under the enforcement provisions applicable to internal revenue taxes because Congress specified that the Harbor Maintenance Tax is to be treated as a customs charge, rather than an internal revenue tax, for all enforcement purposes. Pet. App. 5a (citing *IBM*, 201 F.3d at 1373).

The court of appeals also rejected petitioner's assertion that Congress authorized an award of interest in this case under 28 U.S.C. 2644. Pet. App. 5a. That

statute "provides for post-summons interest for claims that invoke the Court of International Trade's jurisdiction under 28 U.S.C. § 1581(a)." Pet. App. 5a. As this Court concluded in *United States Shoe Corp.*, 523 U.S. at 365, jurisdiction in this case is based on Section 1581(i), not on Section 1581(a). Under the clear text of 28 U.S.C. 2644, interest is therefore not available under that statute in this case. Pet. App. 5a.

The court similarly rejected petitioner's assertion that an award of interest in this case is authorized by 19 U.S.C. 1505(c). That customs provision specifies that "[i]nterest on excess moneys deposited shall accrue * * * *from the date the importer* * * * *deposits estimated duties*, fees, and interest * * * *to the date of liquidation* or reliquidation *of the applicable entry* * * * ." 19 U.S.C. 1505(c) (emphasis added). The court held that this statute has no application to the claim for interest in this case because it authorizes interest only in cases that involve an improper assessment of customs duties and fees on imported articles upon their entry into the customs territory of the United States. Pet. App. 6a. Because this statute "speaks only to imports" and "does not apply to exports," the court "declined to rewrite the 'Congressional enactment to make it fit a case for which it was clearly not intended.'" *Ibid.* (quoting *IBM*, 201 F.3d at 1374).

b. The court of appeals also rejected petitioner's assertion that the Constitution requires the payment of interest in this case. Petitioner argued that the Harbor Maintenance Tax constitutes a taking of property without compensation and that interest is therefore required by the Fifth Amendment of the Constitution. The court of appeals explained that a fee charged for the use of government-maintained port facilities does not constitute a taking for which "just compensation" is

required by the Fifth Amendment. Pet. App. 7a (citing *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)). The court emphasized that the Harbor Maintenance Tax "did not rise to the level of a taking" because it did not impose an "excessive" charge for the use of government facilities. Pet. App. 8a. The harbor maintenance fee had been stricken only for shipments of exported goods under the Export Clause; it had not been stricken for *any* goods under the Takings Clause. Moreover, it was stricken for shipments of exported goods only because the fee was "proportional to the value of the exported goods" rather than to "the actual use of the harbors." *Id.* at 7a (citing *United States Shoe Corp.*, 523 U.S. at 369). The fact that this fee had been calculated by the use of factors that were invalid *for exporters only* did not support a claim that an unconstitutional "taking" of property had occurred. *Id.* at 8a.[1]

The court also rejected petitioner's claim that interest is authorized in this case by the Export Clause itself. The court concluded that, while the Export Clause requires the return of duties and other exactions improperly imposed on exported goods, nothing in the text of that Clause "mandates the payment of interest." Pet. App. 9a. The court emphasized that, unlike the Takings Clause, the Export Clause "lacks * * * remedial language" that would authorize an award of interest. *Id.* at 11a.

---

[1] The court also rejected petitioner's claim that the Harbor Maintenance Tax violates the Due Process Clause. The court explained that a governmental charge for the use of port facilities is not arbitrary or capricious, for it serves the rational purpose of requiring entities who use and benefit from port facilities to fund their maintenance. Pet. App. 9a.

c. Finally, the court rejected petitioner's broad assertion that, even without any specific consent to an award of interest in a statute or constitutional provision, courts should award interest in this case under principles of restitution and unjust enrichment. The court noted that this request for judicial legislation could not be reconciled with the firmly established principle that awards of interest against the United States must be based on the express, "affirmative and unequivocal" consent of the United States. Pet. App. 11a (citing *Library of Congress* v. *Shaw*, 478 U.S. 310, 311 (1986)).

ARGUMENT

The court of appeals correctly held that the statutes and constitutional provisions on which petitioner relies do not authorize an award of interest against the United States in the context of this case. The decision of the court of appeals properly applied well-established principles governing waivers of sovereign immunity to the particular facts of this case. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court has made clear that "interest cannot be recovered [from the United States] unless the award of interest was affirmatively and separately contemplated by Congress." *Library of Congress* v. *Shaw*, 478 U.S. 310, 315 (1986). "In the absence of an express congressional consent to the award of interest * * *, the United States is immune from an interest award." *Id.* at 314. The court of appeals correctly determined that none of the statutes cited by petitioner satisfies the requirement of *Shaw* that there be an "express congressional consent to the award of interest" (*ibid.*) for

the harbor maintenance fees at issue in this case. Pet. App. 4a-6a.[2]

a. Petitioner errs in relying on 28 U.S.C. 2411, which authorizes interest only on a judgment for the "overpayment * * * of any internal-revenue tax." As the court of appeals correctly held, the plain text of this statute does not authorize interest for payments of harbor maintenance fees. Pet. App. 5a (citing *IBM*, 201 F.3d at 1371-1374). Recognizing that a fee imposed for the use of specific government facilities differs from the ordinary concept of an "internal-revenue tax," Congress specified in 26 U.S.C. 4462(f)(3) that the Harbor Maintenance Tax "shall *not* be treated as a tax" under "any * * * provision of law relating to the administration and enforcement of internal revenue taxes." *Ibid.* (emphasis added). Because Congress expressly elected to make the Harbor Maintenance Tax subject to the enforcement provisions of the customs laws instead of the enforcement provisions of the tax laws (26 U.S.C. 4462(f)(1)), the authority to award interest in a case involving a refund of an "internal-revenue tax" (28 U.S.C. 2411) is expressly and intentionally inapplicable to this case. Pet. App. 5a; *IBM*, 201 F.3d at 1371-1372.

Petitioner errs in claiming (Pet. 19) that the requirement in this statute that the Harbor Maintenance Tax "not be treated" as an internal revenue tax for purposes of "administration and enforcement" (26 U.S.C. 4462(f)(3)) does not preclude treatment of this port use fee as

---

[2] This Court declined to review the same statutory contentions when they were raised by an identically-situated exporter two years ago in the *IBM* case. See 531 U.S. 1183 (2001). The petitioner in *IBM* had not even sought to raise the constitutional theories for an award of interest that were raised, and rejected by the court of appeals (Pet. App. 6a-11a), in this case.

an "internal-revenue tax" for purposes of a judicial award of interest. The court of appeals correctly noted that the portion of the Internal Revenue Code that concerns "Procedure and Administration" of internal revenue taxes includes the provisions that govern "Judicial proceedings"—such as civil actions by the United States (subchapter A), civil actions by taxpayers and third parties (subchapter B), and Tax Court proceedings (subchapter C). *IBM*, 201 F.3d at 1372-1373. The court correctly held (Pet. App. 5a) that, by making the *entire* judicial and administrative enforcement mechanism that applies to internal revenue taxes inapplicable to the Harbor Maintenance Tax, Congress necessarily precluded application of the statute that authorizes interest only in cases involving an "overpayment" of an "internal-revenue tax." 28 U.S.C. 2411. A statute that authorizes interest for overpayments of an "internal-revenue tax" plainly does not constitute "express congressional consent to an award of interest" (*Library of Congress* v. *Shaw*, 478 U.S. at 314) for an exaction that Congress specified is "not [to] be treated as a tax" (26 U.S.C. 4462(f)(3)).

b. Petitioner similarly errs in claiming that 19 U.S.C. 1505(c) authorizes an award of interest in this case. As the court of appeals explained in *IBM*, "[o]n its face, [Section 1505] contemplates an entirely different factual scenerio from the one before us." 201 F.3d at 1374. Under its plain text, this statute authorizes interest only in cases in which an "importer of record" is seeking to recover a duty or other customs charge paid in connection with the "liquidation or reliquidation" of an "entry" of goods into the United States. 19 U.S.C. 1505(c). The harbor maintenance fee does not fall within any portion of the text of this statute, for it does not impose a customs duty on an "importer of record" for

the "entry" of goods into this country. Pet. App. 5a-6a.[3] Under its plain text, the statute on which petitioner relies thus simply has no application to this case. *Ibid.* And, as the court of appeals emphasized, courts are "without power to rewrite" this statute "to make it fit a case for which it was clearly not intended * * * ." *Id.* at 6a (quoting *IBM*, 201 F.3d at 1374).

Petitioner nonetheless argues (Pet. 14) that the fact that courts have authority to order refunds of harbor maintenance fees necessarily implies that courts also may award interest on such refunds. In *Library of Congress* v. *Shaw*, 478 U.S. at 314, however, this Court rejected an identical contention. The Court held in *Shaw* that, "[i]n the absence of express congressional consent to the award of interest *separate from a general waiver of immunity to suit*, the United States is immune from an interest award." *Ibid.* (emphasis added). The fact that "the Government [is] liable" for the principal amount does not "waive the Government's

---

[3] Customs duties are imposed in connection with the formal entry of an article into the customs territory of the United States. *BMW Manufacturing Corp.* v. *United States*, 241 F.3d 1357, 1362 (Fed. Cir.), cert. denied, 534 U.S. 1065 (2001). Such duties are imposed on importers—not on exporters—under the Harmonized Tariff Schedule of Title 19 of the United States Code. See, *e.g.*, 19 U.S.C. 197, 1484, 1503. By contrast, the Harbor Maintenance Tax is imposed equally on the use of port facilities by domestic shippers, importers and exporters. 26 U.S.C. 4461(c)(1). This user fee does not constitute *either* an internal revenue tax or a duty, as those terms are ordinarily employed. It is instead simply a "generalized Federal charge for the use of certain harbors." *Texport Oil Co.* v. *United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999); see 66 Fed. Reg. 34,818 (2001) (citing 31 U.S.C. 9107). A fee for the use of government facilities is not a "tax" or a "duty" but is instead "compensation" for services provided. *United States Shoe Corp.*, 523 U.S. at 369.

traditional immunity from interest." *Id.* at 323. The court of appeals therefore correctly rejected petitioner's contrary assertion in this case. Pet. App. 5a-6a.[4]

2. a. Petitioner errs in claiming that the Export Clause authorizes an award of interest in this case. The court of appeals correctly held that, "[i]f not granted by statute, the Supreme Court has held only the Fifth Amendment of the Constitution to mandate the payment of interest." Pet. App. 6a.

In *Smyth* v. *United States*, 302 U.S. 329 (1937), this Court confirmed the longstanding rule that prohibits awards of interest against the United States except under the Takings Clause of the Fifth Amendment or pursuant to an express waiver of sovereign immunity by Congress. The Court noted that (*id.* at 353 (emphasis added)):

> The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in the payment of the principal * * * . *The allowance of interest in eminent domain cases is only an*

---

[4] Petitioner also advances the novel contention that a "draft notice of proposed rulemaking" issued by the Customs Service supports an award of interest in this case. Pet. 17. It is, of course, well established that "mere proposals" of draft regulations are binding on no one and have "little consequence." *Boeing Co.* v. *United States*, No. 01-1209, slip op. 15 n.13 (Mar. 4, 2003). Moreover, the regulations ultimately adopted by the agency address only duties and fees owed upon the liquidation of an entry of goods by an importer. See 64 Fed. Reg. 56,436 (1999). The final regulations (which petitioner ignores) therefore have no application to the exporter's claim in this case.

apparent exception, which has its origin in the Constitution.

In *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951), the Court again emphasized that "the only exception [to the no-interest rule] arises when the taking entitles the claimant to just compensation under the Fifth Amendment. *Only in such cases does the award of compensation include interest.*" *Id.* at 49 (emphasis added). Accord, *e.g.*, *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 47 (1928). The Court has held that the unique, remedial language of the "just compensation" requirement of the Fifth Amendment represents a sufficient waiver of the no-interest rule. *Library of Congress* v. *Shaw*, 478 U.S. at 317 n.5 ("To satisfy the constitutional mandate, 'just compensation' includes a payment for interest."); *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923). See also *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987) (the Fifth Amendment is not designed "to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). As the court of appeals correctly held in this case, the prohibitory language of the Export Clause does not support an award of interest because it contains no similar, express remedial directive and, in particular, includes no broad undertaking to pay "just compensation" for violations. Pet. App. 6a-7a.[5]

---

[5] Petitioner errs in suggesting (Pet. 21) that the decision of this Court in *Fairbank* v. *United States*, 181 U.S. 283 (1901), provides support for the proposition that an award of interest is authorized by the Export Clause. Nothing in *Fairbank* endorses that claim. The portion of the *Fairbank* decision quoted in the petition (Pet.

This holding of the court of appeals properly applies the decisions of this Court and does not conflict with any decision of any other court. Moreover, contrary to petitioners' assertion (Pet. 23), the decision in this case also does not conflict with the earlier decision of the same court in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001). In *Cyprus Amax*, the court concluded that an award of monetary relief is permitted under the Tucker Act for a violation of the Export Clause because that Clause "contemplates money damages as a remedy for its violation." 205 F.3d at 1376. The separate question whether the Export Clause provides authority for an award of *interest* was not raised or addressed in *Cyprus Amax*. And, in *Library of Congress* v. *Shaw*, this Court made clear that, even when sovereign immunity from monetary relief has been waived, there is a "requirement of a separate waiver" before interest may be awarded. 478 U.S. at 314. The Court explained in *Shaw* that this "separate waiver" requirement "reflects the historical view that interest is an element of damages separate from damages on the substantive claim." *Ibid.* Petitioner simply overlooks this central holding of the *Shaw* decision. Applying that settled rule in this case, the court of appeals correctly held that no such "separate waiver" for an award of interest exists under the Export Clause. Pet. App. 6a-7a. See *United States* v. *Alcea Band of Tillamooks*, 341 U.S. at 49.

21-22) contains nothing more than a general discussion of the fact that the Export Clause was consciously designed to prohibit taxes and duties on exports. 181 U.S. at 292-293. That general discussion of the Export Clause in *Fairbank* supports the conclusion of the court of appeals in this case that the Export Clause is a "prohibitive" provision (Pet. App. 11a), and nothing in *Fairbank* addresses the "remedial" (*ibid.*) issue addressed in this case.

b. Petitioner has no right to interest under the Takings Clause of the Constitution because no "taking" occurred. The court of appeals correctly explained that the requirement that exporters, importers and domestic shippers pay a fee for each use of port facilities does not constitute a taking of private property. Pet. App. 7a. As this Court held in *United States* v. *Sperry Corp.*, 493 U.S. 52, 63 (1989), a "reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services."[6] Applying that holding in this case, the court of appeals properly concluded that the harbor maintenance fee imposed by Congress on all shippers who use harbor facilities was not "excessive" and therefore did not effect a "taking" under this Court's decision in *Sperry*. Pet. App. 8a. Even though the court of appeals prominently relied on *Sperry* (Pet. App. 8a), petitioner fails to cite or even note the existence of that decision in the petition.[7]

c. Finally, petitioner cannot avoid the no-interest rule by characterizing its claim as one designed to

---

[6] The court of appeals correctly noted that the port use fees that are collected to reimburse the government for the costs of maintaining port facilities are "not held by the government as property of U.S. Shoe." Pet. App. 8a. The harbor maintenance fees are held in a trust fund that is applied only for harbor maintenance purposes. 26 U.S.C. 9505.

[7] Petitioner also does not address the fact that the harbor maintenance fee applies to *importers and domestic shippers* as well as to exporters. While the Export Clause protects exporters from a fee that "does not correlate reliably with the federal harbor services, facilities, and benefits used or usable by the exporter" (*United States Shoe Corp.*, 523 U.S. at 369), that does not alter the analysis applied under the Takings Clause in determining whether a user fee is "excessive." It would not be "excessive" for exporters unless it were also "excessive" and (thus a violation of the Takings Clause) for importers and domestic shippers as well.

achieve "equity" or to recover "profits that [the government] actually earned on unlawful exactions" (Pet. 23). "[T]he force of the no-interest rule cannot be avoided simply by devising a new name for an old institution: '[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it.'" *Library of Congress* v. *Shaw*, 478 U.S. at 321 (quoting *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976)). Petitioner's claim for the asserted "profits" earned by the government is nothing more than a thinly disguised attempt to recover interest by invoking a fiction that this Court has routinely rejected.

For example, more than a century ago, in *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 (1888), this Court held that a plaintiff's claim for the income derived by the United States from the investment of funds belonging to the plaintiff was barred by the no-interest rule. In that case, the government had collected a sum of money from Spain in arbitration proceedings conducted on behalf of a plaintiff for injuries and damages suffered by her while she was in Cuba. The United States paid this recovery to the plaintiff, but withheld $41,129 until Spain paid the expenses of the arbitration. After receiving that additional payment from Spain, the United States paid the withheld amount to the plaintiff without the interest that had been earned through investment of those funds. *Id.* at 252-255. This Court held that, in the absence of an express waiver of immunity, the plaintiff's claim for the interest earned on the withheld funds was barred by the "no-interest" rule (*id.* at 259-260 (emphasis added)):

> Th[e] claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time that it was withheld; *but the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally,* or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money. *The case, therefore, falls within the well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect.*

This Court applied that same principle in *United States* v. *Louisiana*, 446 U.S. 253, 264 (1980). The Court held in that case that, in the absence of an express waiver, the no-interest rule barred the recovery of interest on funds impounded by the United States pending resolution of a territorial dispute between the United States and the State of Louisiana. The Court held that this result was not altered by the fact that the funds had been "commingled with general funds of the Treasury and used in governmental operations." *Ibid.*

Petitioner errs in relying on *Henkels* v. *Sutherland*, 271 U.S. 298 (1926), to support a claim that an express waiver of governmental immunity is not required to recover profits earned on "unlawful exactions" (Pet. 23). The *Henkels* decision is clearly inapposite, for the Court concluded that the statute involved in that case provided for the recovery of interest along with principal. In *Henkels*, the petitioner owned shares of stock

that were seized by the Alien Property Custodian as "enemy-owned property" under the Trading with the Enemy Act of October 6, 1917. *Id.* at 299. That stock was sold by the Custodian, and the proceeds were deposited with the Treasury where they were commingled with the proceeds from the sale of other alien property and invested in interest-bearing government securities. *Ibid.* The same statute that authorized these seizures also authorized a suit in equity to recover, for any mistakenly seized property, the "net proceeds received * * * and held by the Alien Property Custodian or by the Treasurer of the United States." *Id.* at 300 (quoting Trading with the Enemy Act of October 6, 1917). Under this statute, Henkels sought to recover the proceeds of the sale along with the interest earned on the government securities. *Id.* at 299-300. This Court held that this claim was encompassed within the statutory right to recover the "net proceeds" held in "the account of the Alien Property Custodian." *Id.* at 300-301. The Court made clear that this statutory right to obtain the "net proceeds" held in the account of the Custodian "is not [a claim] for interest to be paid by the United States in the sense of the [no-interest] rule." *Id.* at 301. The Court's decision in *Henkels* thus neither expressly nor by implication contradicts the established rule that "[t]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *Library of Congress* v. *Shaw*, 478 U.S. at 321 (citation omitted).[8]

---

[8] Petitioner's suggestion that *Henkels* supports an award of interest whenever an "unlawful exaction" occurs (Pet. 23) simply cannot be reconciled with the text of that decision. The Court

Finally, petitioner errs in relying (Pet. 23-24) on the decisions of the Sixth and Ninth Circuits that have held that, in the absence of a statutory waiver, interest may be awarded against the government in currency forfeiture cases. See, *e.g.*, *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998); *United States* v. *$133,735.30 Seized*, 139 F.3d 729 (9th Cir. 1998); *United States* v. *$277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995). Those decisions have been severely criticized,[9] for they cannot be reconciled with the decisions of this Court. Indeed, in *United States* v. *$133,735.30*, *supra*, the Ninth Circuit cited *no* decisions of this Court. And, in *United States* v. *$277,000 U.S. Currency*, 69 F.3d at 1492, the only decision cited was *Library of Congress* v. *Shaw*, which the Ninth Circuit purported to distinguish as a case that involved a prohibited award of "interest" instead of one that involved a claim for the financial "benefit" that the government received "from an asset that it has been holding improperly." 69 F.3d at 1498.[10] In attempting to

---

emphasized in *Henkels* that whether or not the exaction was unlawful had no bearing on its resolution of the statutory issue before it. 271 U.S. at 300 ("No question is made in respect of the right of the Custodian to seize property supposed to belong to an enemy, although it may subsequently turn out to have been a mistake, adequate provision having been made for a return in that case.").

[9] Several other circuits have disagreed with the suggestion that the "no-interest" rule is inapplicable to such cases. See *Larson* v. *United States*, 274 F.3d 643, 645-647 (1st Cir. 2001); *United States* v. *$30,006.25 in U.S. Currency*, 236 F.3d 610, 613 (10th Cir. 2000); *United States* v. *$7,990.00 in U.S. Currency*, 170 F.3d 843, 845 (8th Cir.), cert. dismissed, 528 U.S. 1041 (1999); *Ikelionwu* v. *United States*, 150 F.3d 233, 238-239 (2d Cir. 1998).

[10] The financial "benefit" that the Ninth Circuit sought to distinguish from "interest" in that case was inconsistently described

distinguish the *Shaw* case in that manner, the Ninth Circuit failed to respect (and even failed to acknowledge) the unequivocal direction of this Court "that 'the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.'" *Larson* v. *United States*, 274 F.3d at 647 (quoting *Library of Congress* v. *Shaw*, 478 U.S. at 321); see note 10, *supra*. The Ninth Circuit also improperly sought to rely on "fairness considerations" and thereby ignored the clear admonition of this Court that "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Larson* v. *United States*, 274 F.3d at 647 (quoting *Library of Congress* v. *Shaw*, 478 U.S. at 321).

The question addressed in these currency forfeiture cases, however, has no continuing importance. See *Larson* v. *United States*, 274 F.3d at 647. As petitioner acknowledges (Pet. 24), Congress has amended the forfeiture statute to allow the recovery of interest prospectively. 28 U.S.C. 2465(b)(1)(C). Any disagreement among the circuits in the currency forfeiture context thus plainly lacks prospective importance. It also does not justify review of the questions presented in the markedly different context of this harbor maintenance fee case. Because the decision in this case properly implements the longstanding decisions of this Court, and does not conflict with decisions of any other circuit, further review is not warranted.

---

elsewhere in its opinion as the "earned interest on money" held by the government. 69 F.3d at 1492.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
PAUL G. FREEBORNE
TODD M. HUGHES
JONATHAN S. LAWLOR
Attorneys

APRIL 2003